UMWA Exhibit 5

General Counsel's Post-Hearing Brief

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

MASSEY ENERGY COMPANY AND ITS
SUBSIDIARY, SPARTAN MINING COMPANY
D/B/A MAMMOTH COAL COMPANY

and Case 9-CA-42057

UNITED MINE WORKERS OF AMERICA

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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Dated: May 18, 2007

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Respondents offered no reason why Wolfe was not hired during the litigation of this matter. No reason was given for Wolfe's non-hire during the investigation of this matter. (G.C. Ex. 12(c)) Although the HRC was advised that Respondent Mammoth never received an application from him, his application placed in the record was procured from Respondent Mammoth (G.C. Ex. 4(www)); a clear indication that it was received. [35]/ Further in support of this point, Banes did not indicate that Wolfe was one of the discriminatees with respect to whom Banes could not locate an application.

VI. RESPONDENT'S MAMMOTH'S AND RESPONDENT'S MASSEY'S RELATIONSHIP:

General Counsel submits that Respondent Massey for many purposes, including personnel related matters, acts as the agent of Respondent Mammoth, and that Respondent Mammoth for many purposes, including the mining of coal (which of necessity involves personnel employed to engage in such activity), which is the core business of Respondent Massey, acts as an agent for Massey. Thus, the statements of Massey personnel, such as its CEO Don L. Blankenship, Vice-President of Investor Relations Katharine Kenny and Attorneys Kimberly Wellons and Harvey Shane are properly considered in evaluating Respondent Mammoth's actions.

In this regard, Respondent Massey and its many direct and indirect subsidiaries clearly make up a single entity. Respondent Massey is technically a mere holding company. (Tr. 738) However, one need only scan the annual reports of Massey to know beyond a doubt that Massey views itself and its subsidiaries as a single entity and that this is how it portrays itself to the world. (G.C. Exs. 11(a) and (b)) In its annual reports Massey describes itself as mining, processing and selling coal. Yet technically it is the various subsidiaries that actually engage in

[35]/ General Counsel Exhibits 4(a)-(xxx) were received from Respondent Mammoth either voluntarily, pursuant to an investigatory subpoena or pursuant to a trial subpoena. (Tr. 343–344)

such conduct. It speaks of having employees – sometimes referred to as "members." "Massey Energy Company" advertises for mining employees. (G.C. Exs. 28(a)-(f)) Yet, as Attorney Kimberly Wellons made clear in her responses on behalf of Massey to HRC charges that "Massey Energy Company has no employees in any state . . ." (G.C. Ex. 17(c))

As Kenny testified, when anyone from Respondent Massey speaks of such things as producing coal, then, "They are talking about the corporation as a whole, which would encompass all of our mining groups." (Tr. 739) Don L. Blankenship is the Chairman, CEO and President of Respondent Massey. (Tr. 1479) As such, he is the highest ranking individual in authority in the corporation. (Tr. 1479) Blankenship testified, in essence, that Respondent Massey does not own property or mine coal except through its direct and indirect subsidiaries. (Tr. 1485-1486) In like vein, at multiple conferences, Blankenship has portrayed Massey as a single entity in conducting its operations and engaging in employment related matters. (See, e.g., G.C. Exs. 61-69)

In an action before a Virginia Circuit Court filed against various entities (including the Union), Massey and Don Blankenship repeatedly aver that as a result of the defendants' actions, they have suffered, inter alia, "increased time and expense for hiring mineworkers, increased delays and expenses in conjunction with the re-opening of the Cannelton mine, [and] lost productivity due to difficulty in attracting and retaining qualified workers. . . ." (G.C. Ex. 19, page 15 at paragraph 49, page 16 at paragraph 56, page 18 at paragraph 64, page 21 at paragraph 72, page 22 at paragraph 79, page 24 at paragraph 86, and page 26 at paragraph 94) There is no mention of Respondent Mammoth anywhere in the entire pleading, thus making clear that although in some respects Respondent Massey operated through Respondent Mammoth, it was still Respondent Massey who was operating and staffing the former Cannelton operations. Indeed, former Horizon Mine Superintendent Michael Haynes reports that during the time that he

was coordinating with Drexel Short with respect to making offers of interviews to the unrepresented Horizon employees, Haynes never heard anything about Spartan Mining or Mammoth Coal operating the old Horizon facilities. (Tr. 918)

In fact, it is clear that Massey and Mammoth comprise a single employer and that each is thus jointly and severally liable for the conduct of the other. The determination of whether two or more entities are sufficiently integrated to be deemed a single employer depends on all of the circumstances of the case. The inquiry focuses on whether the entities' total relationship reveals: (1) centralized control of labor relations (2) common management, (3) interrelation of operations, and (4) common ownership. *Radio Union v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1965); *Flat Dog Productions, Inc.*, 347 NLRB No. 104 (2006). The first three factors are the most significant, and the first factor - centralized control of labor relations - is "of particular importance because it tends to demonstrate 'operational integration.'" *RBE Electronics of S.D., Inc.*, 320 NLRB 80 (1995); *Mercy Hospital of Buffalo*, 336 NLRB 1282, 1283-1284 (2001). However, no single factor in the single-employer inquiry is deemed controlling, nor do all of the factors need to be present in order to support a finding of single-employer status. "Rather, single-employer status depends on all the circumstances, and is characterized by the absence of the arm's-length relationship found between unintegrated entities." *Flat Dog Productions, Inc.*, 347 NLRB No. 104, slip op. at 2-3 (2006).

A. Centralized control of labor relations:

According to Jeff Gillenwater, Massey Coal Services Director of External Affairs and Administration, the resource groups (of which Mammoth is one) are usually given a wage rate for a position which is set by senior managers and the Board of Directors. (Tr. 2127) Gillenwater testified that the benefit package of employees is also set by senior managers and the board of directors. (Tr. 2137) Gillenwater clarified that the board of directors that he was

referring to was that of Respondent Massey. (Tr. 2201) Gillenwater further testified that Blankenship or a compensation committee comprised of Respondent Massey's board members set benefits. (Tr. 2201-2202) Blankenship testified that reimbursement packages for the different Massey operations are made at Respondent Massey's level – apparently ultimately by him. (Tr. 1594-1595) Indeed, Blankenship appears to personally become involved in many details associated with the human resources function of Massey Coal Services – such as exploring a program involving driving mileage related to retention issues. (Tr. 2149-2150)

Even in day-to-day operations, Massey controls certain aspects of Mammoth's labor relations. For example, Doss' notes indicate that on February 23, 2005, Respondent Massey's Drexel Short directed that each Mammoth employee involved in a safety related shut down of part of the mine due to ventilation issues was to sign an agreement assenting to adherence of a roof control plan. Short further ordered Doss to make certain that a suspension letter went into each such employee's file. (Resp. Mammoth Ex. 65, under 2-23-05 date)

B. Common management:

There is such an interrelation of managers that there often appears to be confusion as to who is doing what for which entity. Blankenship exercises obvious control over all aspects of Massey subsidiaries' operations. Gillenwater exercises control over various subsidiaries' employment related matters. In general, Massey Coal Services is the subsidiary providing assistance such as accounting, legal, engineering and human resources services to other subsidiaries. It essentially functions as an "internal consulting group" for the Massey resource groups. (Tr. 2133) With respect to human resources, Massey Coal Services personnel provide assistance with compensation issues with an eye toward what is the appropriate compensation package in a particular geographic area. (Tr. 2136)

C. Interrelation of Operations:

All of Massey's operations are clearly integrated into the entity that is Massey. Mine Superintendent Ray Hall testified that the policies and procedures are the same from one Massey mine to another. (Tr. 2759) Massey simply does not differentiate itself from its operations. For example, all the managers of the various corporate entities who testified in this matter use the same e-mail address - MasseyEnergyCo.com. See the testimony of Dave Hughart, (Tr. 1604); Jennifer Chandler, (Tr. 1620); Jon Adamson, (Tr. 1656); Jeff Gillenwater (Tr. 2199); and Kevin Doss (Tr. 2703). Moreover, apparently everyone at Massey coal operations is covered by the same pension plan. (Tr. 2195)

D. Common Ownership:

Massey is a publicly traded corporation. It ultimately owns Mammoth. Therefore, whoever owns Massey, is the owner of Mammoth.

VII. RESPONDENTS VIOLATED SECTION 8(a)(3) OF THE ACT BY THEIR FAILURE TO HIRE THE ALLEGED DISCRIMINATEES:

A. The Legal Framework for an 8(a)(3) Violation:

In the recent case of *Planned Building Services,* 347 NLRB No. 64 (2006), the Board clarified the legal standard to be applied in cases where a successor employer allegedly refuses to hire its predecessor's employees to avoid a bargaining obligation with the union representing those workers. In a unanimous decision, the Board held that the proper standard to apply in a successorship-avoidance case is the one set forth in *Wright Line*, 251 NLRB 1083 (1980), for unfair labor practice allegations that turn on employer motivation, rather than that found in *FES*, 331 NLRB 9 (2000), – although *FES* is still to be utilized in non-successorship failure to hire cases. The Board noted that in a successorship case, unlike other failure to hire cases, the predecessor's employees presumptively meet the successor's qualifications for hire and there is

Root, Inc., 334 NLRB 628, 631 (2001); *Daufuskie Island Club & Resort*, 328 NLRB at 421 and cases cited therein.

B. Demand for Recognition:

Where an employer attempts to defeat the application of the Board's successorship doctrine through unlawful discrimination in the failure or refusal to hire the predecessor's employees, a demand for recognition or bargaining by the Union is unnecessary for finding an 8(a)(5) violation. See, *Smith & Johnson Construction Co.*, 324 NLRB 970 (1997); *Triple A Services*, 321 NLRB 873, 877 fn. 7 (1996); *Precision Industries*, 320 NLRB 661, 711 (1996); *Fremont Ford Sales*, 289 NLRB 1290 (1988).

C. Conduct in Violation of Section 8(a)(5) of the Act:

In addition to Respondents violating the Act by their general failure to recognize and bargain with the Union, Respondents also violated Section 8(a)(5) of the Act by unilaterally setting the unit employees' terms and conditions of employment. Although a successor employer ordinarily is free to set initial terms on which it will hire the predecessor's employees, *Burns*, supra, 406 U.S. at 294-295; *Holly Farms Corp. v. NLRB,* 48 F.3d 1360, 1368 (4th Cir. 1995), that right is forfeited, where, as here, the successor unlawfully fails to hire the predecessor's employees. See. e.g., *Brown & Root, Inc.*, 334 NLRB at 631; *Advanced Stretchforming International, Inc.*, 323 NLRB 529 (1997).

Respondents may note that a bankruptcy court abrogated the collective-bargaining agreement that existed under Horizon's Cannelton/Dunn Coal and Dock operations. This is true. However, it appears from the record that Horizon continued with the same wages and benefits for its actively working employees. Thus, Respondents' obligation to continue these wages and

benefits does not flow from any contractual obligation, but from its duty to maintain the status quo ante until it negotiates in good faith with the Union concerning changing them.

IX. THE REMEDY: [41]/

In addition to an appropriate backpay remedy based on the wages and benefits as they existed under Horizon, General Counsel seeks that Respondents offer employment to all of the discriminatees in its Mammoth operations, displacing, if necessary, the employees currently working there.

In addition, General Counsel seeks an order obligating Respondents to recognize and, on request, bargain with the Union. Respondents should also be ordered, upon request of the Union, to rescind any departures from the terms and conditions of employment that existed among the Horizon employees immediately prior to Respondents' take over of the Horizon operations, and make whole the bargaining unit employees by remitting all wages and benefits, plus interest, that would have been paid absent these unilateral changes until Respondents negotiate in good faith with the Union to agreement or to impasse; subject to Respondents' demonstration in a compliance hearing that had lawful bargaining taken place, less favorable terms than had existed

[41]/ A suggested Notice to Employees is attached hereto as Appendix E.

under Horizon would have been lawfully imposed. *Planned Building Services, Inc.*, 347 NLRB No. 64, at slip op. 5-6 and 9. (See also, *Downtown Hartford YMCA*, 349 NLRB No. 92, in which the Board issued its Decision and Order on April 30, 2007, and found a violation relying on the criteria set forth in *Planned Building Services*.)

Dated at Cincinnati, Ohio this 18th day of May 2007.

Respectfully submitted,

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Attachments

UMWA Exhibit 6

Massey Energy's Post-Hearing Brief

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the matter of:

MASSEY ENERGY COMPANY AND ITS SUBSIDIARY, SPARTAN MINING COMPANY D/B/A MAMMOTH COAL COMPANY

and **Case No. 9-CA-42057**

UNITED MINE WORKERS OF AMERICA

THE POST-HEARING BRIEF OF MASSEY ENERGY COMPANY

Massey Energy Company (hereinafter Respondent Massey Energy or "Massey") files its post-hearing brief in the above-referenced unfair labor practice proceedings and respectfully shows the following:

I. INTRODUCTION

Respondent Massey Energy is a publicly traded holding company. It owns, directly or indirectly, the stock of a number of subsidiaries which own and operate coal mines. Massey itself does not operate any mines and does not employ any miners. Respondent Spartan Mining Company d/b/a Mammoth Coal Company (hereinafter "Mammoth") operates a coal mine and preparation plant in and around Montgomery, West Virginia. A.T. Massey, a wholly owned subsidiary of Massey Energy Company, purchased certain assets and property of bankrupt Horizon Natural Resources Company on August 17, 2004, and established Spartan Mining Company d/b/a Mammoth Coal Company to operate portions of the former Horizon site. Mammoth began operations in the fall of 2004, and was solely responsible for hiring its workforce.

create an agency relationship. Moreover, on at least one occasion, a court has determined that a subsidiary of A.T. Massey could not bind its parent or affiliates under ordinary agency principles, even though that court had determined that A.T. Massey and the subsidiary were a "single-employer." A.T. Massey Coal Co., Inc. v. Int'l Union, United Mine Workers of America, 799 F.2d 142, 146-47 (4th Cir. 1986). The concepts of agency and "single-employer" are distinguishable, and the determination that a parent and subsidiary are a "single-employer" does not render that parent and subsidiary principal and agent.[6]

The General Counsel has not shown any indicia of control by Massey Energy over Mammoth, nor has it alleged that Mammoth asserts any control over Massey Energy. The General Counsel has also failed to show that any other indicia of an agency relationship exists between these two corporations. As such, no agency relationship exists between these two corporations. The absence of an agency relationship precludes any finding that Massey Energy committed an unfair labor practice through Mammoth, and precludes any finding that any statements or actions by any Massey Energy employee can be imputed to employees of Mammoth. As such, Massey Energy cannot be held liable for any actions by Mammoth, and Mammoth cannot be held liable for any actions attributable to Massey Energy.

B. Statements by Agents of Massey Energy Cannot Be Attributed to Mammoth

The General Counsel has attempted to attribute certain statements concerning the union made by employees of Massey Energy or its subsidiaries to Mammoth; however, in order for this argument to succeed, the individual employees of Massey Energy must be found to be agents of Massey

[6] It should be noted that there is no allegation in the original complaint or any amended complaint that Massey Energy and Mammoth Coal constitute a single employer.

UMWA Exhibit 7

Mammoth's Post-Hearing Brief

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF ADMINISTRATIVE LAW JUDGES

In the matter of

MASSEY ENERGY COMPANY AND ITS
SUBSIDIARY SPARTAN MINING COMPANY
D/B/A MAMMOTH COAL COMPANY

and **Case 9-CA-42057**

UNITED MINE WORKERS OF AMERICA

BRIEF OF SPARTAN MINING COMPANY D/B/A MAMMOTH COAL COMPANY

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Dewey Dorsey (Discriminatee)	Former Cannelton (UMWA member)	Mammoth contacted Dorsey, set up an interview, conducted the interview, recommended him for hire and offered him a job as an underground electrician. (Tr. 2802). Dorsey did not accept the job because he preferred a job at the preparation plant. (Tr. 2803).
Donald Stevens (Discriminatee)	Former Cannelton (UMWA member)	Mammoth contacted Stevens, set up an interview, conducted the interview, recommended him for hire, and offered him a job. (Tr. 2817). Stevens did not accept the job because he did not want to deal with the picketing activity. (Tr. 2817).

As referenced above, in light of the UMWA's efforts to thwart the hiring process at Mammoth and otherwise obstruct its ability to produce and process coal at the site, it is no surprise that many of the UMWA members turned down jobs. By its threats, picketing, and vandalism the UMWA was sending a clear message to its membership to obstruct Mammoth's hiring process.

As the facts in the record show, there is no factual basis for the Complaint that Mammoth refused to hire the discriminatees because of their union affiliation. For the following reasons, the Complaint should be dismissed.

III.
ARGUMENT

A. MASSEY CANNOT BE MAMMOTH'S AGENT BECAUSE MAMMOTH DOES NOT CONTROL MASSEY'S CONDUCT.

Paragraph 5(a) of the Complaint alleges that "at all material times, Respondent Massey and Respondent Mammoth have been agents of each other, ...". The Answers each denied the allegations. Because there is no evidence that shows that Mammoth had any control over Massey, the evidence failed to show Massey is Mammoth's agent and Mammoth is therefore not charged with the actions (including advertising) and statements of Massey's agents.

The rule is well set out in the recent case of *Strack and Van Til Supermarkets d/b/a Town & Country Supermarkets*, 340 NLRB 1410 (Jan. 14, 2004). There, the General Counsel alleged that C&T Properties, a tenant of the picketed respondent employer Strack, acted as its agent in seeking police intervention with protected picketing. In holding that proof that Strack's agent asked C&T's agent to contact the police, and that C&T did so at Strack's "request" insufficient, the Board wrote:

> The Board's consideration of questions of agency under the NLRA is guided by the followed settled principles:
>
> > It is well established that, under Section 2(13) of the Act, employers and unions are responsible for the acts of their agents in accordance with ordinary common-law rules of agency. *Longshoremen Local 1814 ILA v. NLRB*, 735 F.2d 1384, 1394 (D.C. Cir. 1984) ("Beyond doubt, the legislative intent of [Section 2(13)] was to make the ordinary law of agency applicable to the attribution of individual acts to both employers and unions."). And, under "hornbook agency law[,] . . . an agency relationship arises only where the principal 'has the right to control the conduct of the agent with respect to matters entrusted to him.'" *Longshoremen ILA v. NLRB*, 56 F.3d 205, 213 (D.C. Cir. 1995) (quoting *Restatement (Second) of Agency Sec. 14* (1958)[.]
>
> *Overnite Transportation Co.*, 333 NLRB 472, 472 (2001).
>
> Although finding C&T to be Strack's agent, the judge did not address the question of whether Strack had the right to control the conduct of C&T. C&T argues in its exceptions that Strack did not have the right to control the conduct of C&T, but merely requested that it contact the mayor of Portage. The General Counsel in his answering brief has not directed our attention to any evidence establishing the element of control. Indeed, we can find no evidence in the record before us establishing that Strack had the right to control the conduct of C&T. In the absence of this necessary element to the formation of an agency relationship, we must dismiss this complaint allegation.

340 NLRB at 1416 (footnote omitted).

One searches the record in vain to find any evidence that Mammoth had the requisite control over, or indeed any control over Massey. There is no such evidence because, in fact Mammoth had exercised no such control because, as a subsidiary, it is self evident, it has no such power. The General Counsel introduced a great deal of evidence of commonality between Massey and its subsidiaries, and of reference to all of them as a single entity. While that evidence is relevant to many of the theories by which one corporation is responsible for the acts of another which might be available to the General Counsel, (*See NLRB v. Deena Artware, Inc.*, 361 U.S. 398 (1960)), it fails on the theory plead and is thus not available for proof upon this Complaint, which alleges agency as a means of binding Mammoth to Massey's statements and actions.

An agency allegation has particular meaning under the Act, as the 1947 Taft-Hartley Amendments specifically modified and clarified the NLRA law regarding agency. It added Section 2(13) of the Act. That addition had a clear legislative intent of changing the Act's agency law to that prevalent under the ordinary principals of agency applicable in other realms. Those ordinary principals indisputably requires that the alleged principal (here Mammoth) have and exercise control over the alleged agent (here Massey). *See Restatement (Second) of Agency, Sec. 14* (1958).

Therefore, none of the huge amount of General Counsel evidence of statements and opinions allegedly or admittedly expressed by Massey CEO Don Blankenship and media spokesperson Katherine Kenny or agents and employees of other Massey subsidiaries are relevant as there is no evidence Mammoth controlled (or even knew about) those actions, statements or opinions. Likewise, the substantial evidence of Massey advertising for experienced miners and complaining about a shortage of them is wholly irrelevant. That

evidence does not elucidate Mammoth's motivation. None of its evidence of the reasons for any of Mammoth's conduct. There is and can simply be no evidence that Massey or its agents are Mammoth's agents because Mammoth did not and could not control them.

The evidence of past disputes and animosity between the Charging Party and Massey does have some use, however, as it explains the Charging Party's attitude and conduct upon the prospect of and their acquisition of the assets by A.T. Massey.

As the General Counsel alleged in opening statement, the "antagonism" of the Charging Party toward Massey and its subsidiaries goes back to the mid-1980s when "Massey essentially broke the Union [UMWA] hold on a single contract for the whole industry." (Tr. 26). That antagonism has been historically marked by outrageous UMWA violence directed at Massey subsidiaries. In the 1985 strike, Blankenship's office and car were shot into, once while he was in it. (Tr. 1540). He survived but others were not so lucky. (Tr. 1556). The violence resulted in numerous contempt violations against the Charging Party over the years since 1985. (*See* G.C. Ex. 91). The victims of UMWA violence in those contempt adjudications of 1981, 1985, 1987 and 1995, relating to conduct in the years preceding them, each included subsidiaries of Massey.

When the bankruptcy auction resulted in A.T. Massey being the only bidder for the Cannelton and Lady Dunn assets, the UMWA expressed its antagonism by busing Cannelton employees to Lexington, Kentucky to protest. (Tr. 1170-73; 1183). Several were arrested. *Id.* The Charging Party appealed in the bankruptcy proceeding opposing the sale. It made no offers in the bargaining preceding the setting aside of the collective bargaining agreements with Cannelton and Lady Dunn and gave no explanation for rejecting their offer. (Mam. Ex. 75, Tab C, *p.* 23 note 10).